Office Supreme Court, U.S.
FILED
JUN 22 1964
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 206

JACKSONVILLE TERMINAL COMPANY, a corporation, ATLANTIC COAST LINE RAILROAD COMPANY, a corporation, and SEABOARD AIR LINE RAILROAD COMPANY, a corporation,

Petitioners,

vs.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners,

vs.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fifth Circuit entered on March 4, 1964, which reversed an order of the United States District Court for the Middle District of Florida, dismissing the case for want of federal court jurisdiction. Petitioners filed a petition for rehearing, which the Court of Appeals denied without opinion on March 31, 1964.

OPINIONS BELOW

The United States District Court for The Middle District of Florida delivered no opinion but entered an order on September 5, 1963 dismissing the case for lack of Federal jurisdiction. This Order was amended for clarification purposes on September 23, 1963. The Order of September 5, 1963 and the Amended Order of September 23, 1963 are printed in Appendix A hereto at pages 15 and 16.

The opinion of The United States Circuit Court of Appeals, Fifth Circuit reversing the District Court (R. 87) is reported in 328 Fed. 2d 720 and is printed in Appendix A hereto at page 17. The judgment of the Circuit Court of Appeals (R 94) is printed in Appendix A hereto at page 22.

The Order of The Circuit Court of Appeals denying Petition For Rehearing (R 101) is printed in Appendix A hereto at page 23.

JURISDICTION

As heretofore stated, the judgment of the Circuit Court of Appeals was entered on March 4, 1964 (R 94) and is printed in Appendix A hereto at page 8a. Rehearing was denied without opinion on March 31, 1964 (R 101) and the Order denying Petition for Rehearing is printed in Appendix A hereto at page 9a. The jurisdiction of this Court is invoked under Sections 1201(c) and 1254(1) of Title 28, United States Code and Rule 19 1(b); Rules of The Supreme Court of The United States.

QUESTION PRESENTED

Where a contract between common carriers by Railroad, as defined in the Interstate Commerce Act, providing for the joint use and operation of terminal facilities, contains a separate clause relating, in part, to the dismissal of certain officers of the terminal company corporation, do the Federal Courts have jurisdiction to determine the contract rights of the parties relating to such dismissal of such Terminal Company officers simply because the overall contract for the joint use and operation of the terminal facilities had been submitted to and approved by the Interstate Commerce Commission under the provisions of Title 49, Section 5(2), United States Code?

STATUTES INVOLVED

Plaintiff in the district court claims that federal court jurisdiction exists under Title 28, United States Code, Section 1337 and the Interstate Commerce Act, Title 49, United States Code, Section 1, et seq., and particularly Section 5(2). Title 28, U. S. Code, Sec. 1337 is set forth herein in Appendix B, page 24, and Title 49 U. S. Code, Sec. 5(2) is set forth herein in Appendix B, page 25.

STATEMENT OF THE CASE

The petitioner, Jacksonville Terminal Company, is a corporation organized and existing under the laws of the State of Florida.

For many years, both prior to and subsequent to the operating and guaranty agreement involved in this case, the corporate stock of the petitioner, Jacksonville Terminal Company, has been wholly owned by the petitioners, Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company, and by the respondent, Florida East Coast Railway Company,

and Southern Railway Company and Georgia Southern & Florida Railway Company (R 2, 11-13).

At all times material hereto the respondent Florida East Coast Railway Company owned or controlled one-fourth of the corporate stock of said Terminal Company, the petitioners Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company owned or controlled one-fourth each of said corporate stock, and Southern Railway Company and Georgia Southern and Florida Railway Company owned or controlled one-eighth each of said corporate stock (R 2).

In the year 1947 the petitioner, Jacksonville Terminal Company, proposed to issue and sell certain First Mortgage Bonds in the amount of $4,000,000 (R 14). In connection therewith an "Operating and Guaranty Agreement" dated December 1, 1947, was executed between the petitioner, Jacksonville Terminal Company, and the above-named owners of its corporate stock, together with United States Trust Company of New York and Frank J. Wideman, the corporate and individual trustees, under the First Mortgage of the Terminal Company dated December 1, 1947 (R 10-56).

This "Operating and Guaranty Agreement" of December 1, 1947 had been submitted for approval to the Interstate Commerce Commission under the provisions of Title 49 Section 5(2), United States Code, on November 3, 1947 and had been approved by the report and order of the Interstate Commerce Commission, both dated November 10, 1947 (R 65-78).

Among other provisions, said "operating and Guaranty Agreement" contained Article Twenty-first as follows:

> "Twenty-First: That the use of said station, tracks and facilities of the Terminal Company by the Railway

Companies shall be subject to the jurisdiction of the Terminal Company and its duly authorized officers and employees; and the Railway Companies agree that while in or about the said terminal facilities of the Terminal Company, their employees and trains shall faithfully conform to all reasonable and proper instructions and directions of all proper officers of, and will use the proper standard time prescribed by, the Terminal Company; PROVIDED, however, that the President or General Manager, or any other officer subject to election by the Board of Directors of the Terminal Company, shall be appointed and serve only by unanimous consent of the Guarantor Companies and shall (any provision of the by-laws of the Terminal Company to the contrary notwithstanding) be dismissed upon the written request of any one of the Railway Companies, and that the dismissal of any subordinate official of the Terminal Company shall be made by the President or the General Manager upon the written request of any one of the Railway Companies. The Terminal Company shall require that the services of all its officers and employees shall be performed without partiality or discrimination as between the Railway Companies."

Said Article Twenty-first is printed in Appendix B hereto at page 29.

Respondent alleged in its complaint that a written request had been submitted by it for the immediate dismissal of the President and General Manager and the General Counsel of the Terminal Company, but that the petitioners, Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company, insisted that they would take no action to honor or enforce such request unless and until the Board of Directors of Jacksonville Terminal Company had dismissed the said officers from their respective positions and their suc-

cessors had been chosen and qualified in accordance with corporate procedure (R 6-7).

Respondent contends that Federal Court jurisdiction exists because the aforesaid operating and guaranty agreement was submitted to and approved by the Interstate Commerce Commission under the provisions of Title 49, Section 5(2), United States Code, and that therefore the action is one arising under the laws of the United States within the meaning of Title 28, Section 1337, United States Code.

The petitioners filed respective motions to dismiss addressed to the respondent's complaint in the District Court, alleging lack of Federal jurisdiction as one of the grounds for such motions (R 56, 59-60).

After due argument an order was entered by the District Judge on September 3, 1963 granting said motions for lack of jurisdiction (R 79). This order was amended for clarification on September 23, 1964 (R 80). Appeal was taken by respondents to the United States Circuit Court for the Fifth Circuit and that court reversed the district court's order and opined that federal court jurisdiction exists (R 87 and App. A p. 17). Petition for rehearing was denied by the Court of Appeals (R 101 and App. A p. 23).

REASONS FOR GRANTING THE WRIT

The ruling of the Court of Appeals is of importance in the proper administration of justice because it affects and enlarges the jurisdiction of the district court in cases arising under the Constitution and treaties and laws of the United States under Title 28, Sections 1331 and 1337, United States Code, by holding that jurisdiction exists in controversies over contracts entered into under authority of a federal statute, although the validity, construction or effect of the statute is not involved.

While the agreement between Jacksonville Terminal Company and its tenant lines was approved under the provisions of Section 5 (2), Title 49, United States Code, the validity, construction or effect of that section is not involved. This is necessary in order to confer federal court jurisdiction. *First National Bank* v. *Williams*, 252 U.S. 504, 64 L. Ed. 690; *Niles-Bement-Pond Company* v. *Iron Moulders Union*, 254 U.S. 77, 65 L. Ed. 145; *Gully* v. *First National Bank*, 299 U. S. 109, 81 L. Ed. 70.

The decision of the Court of Appeals is therefore in apparent conflict with applicable decisions of the United States Supreme Court and decisions of other Courts of Appeal, so that certiorari should be granted. *Heflin* v. *U. S.*, 358 U.S. 415, 79 S. Ct. 451, 3 L.Ed. 2d 407; *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 79 S. Ct. 468, 3 L.Ed. 2d 368; Rule 19 1 (b), *Rules of The Supreme Court of The United States*.

Although the judgment is not a final one, the issue is fundamental to the further conduct of the case inasmuch as it involves the jurisdiction of the Court and certiorari is therefore a proper remedy. *Land* v. *Dollar*, 330 U.S. 731, 67 S. Ct. 1009, 91 L.Ed. 1209; *U.S.* v. *General Motors Corp.*, 323 U.S. 373, 65 S. Ct. 357; 89 L.Ed. 311; *American Construction Co.* v. *Jacksonville etc. R. Co.*, 148 U.S. 372, 13 S. Ct. 58, 37 L.Ed. 486.

As stated before, only one question is involved, i. e., does the District Court have jurisdiction of this case under Title 28, Section 1337, United States Code, which reads:

> "The district court shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraint and monopoly. June 25, 1948, c. 646, 62 Stat. 931."

In order for jurisdiction to attach under this section an appropriate statement by the plaintiff, unaided by any anticipation or avoidance of defenses, must disclose that the controversy really and substantially involved a dispute respecting the validity, construction or effect of an Act of Congress, upon a determination of which the result of the litigation depends. *First National Bank* v. *Williams*, 252 U. S. 504, 64 L. Ed. 690; *Gully* v. *First National Bank*, 299 U. S. 109, 81 L. Ed. 70; *Niles-Bement-Pond Co.* v. *Iron Moulders Union*, 254 U. S. 77, 65 L. Ed. 145.

There is no allegation in respondent's Complaint (R 1-9) that the operations of the respondent had been in anywise interfered with or that the respondent had been deprived of any rights or privileges in and about the operations of the facilities of the Terminal Company. Copy of the operating and guaranty agreement was attached to the complaint (R 10-54). Copy of the report and order of the Interstate Commerce Commission was not attached to the complaint, filed May 20, 1963, but was filed in open court September 4, 1963 (R 65-78). On September 5, 1963 the court granted petitioners' motion to dismiss the complaint for lack of jurisdiction (R 79).

The Court of Appeals quoting from its opinion in *Dickson* v. *Edwards*, 293 Fed. 2d 211, stated:

> "The test is the familiar one that it must appear from the complaint that the construction of a federal statute will have an adverse effect on the right of recovery if the statute is construed one way rather than another way."

and held:

> "We think the contract which was authorized by the federal statute and made legal only because of the federal statute may be construed by the federal court upon application of the plaintiff."

In so holding the Court apparently overlooked the fact that in order to confer federal jurisdiction under both Sections 1331 and 1337 of Title 28, United States Code, the construction of the federal statute, rather than the construction of the agreement, must be in question and such construction must really and substantially involve the validity construction or effect of the statute. No such construction of any federal statute is involved here. To use the language of Mr. Justice Cardoza in *Gully* v. *First National Bank*, supra, (299 U.S., page 117):

> "The most one can say is that a question of federal law is lurking in the background."

The report of the Interstate Commerce Commission on the application of Jacksonville Terminal Company and the other parties, above referred to (R 65), goes at length into the financial situation and the effect of the issue of the $4,000,000 of bonds sought to be approved, as does the order of the Commission based on that report (R 75), but insofar as the operations of the terminal are concerned, the order merely provides (R 77):

> "*It is further ordered*, That, subject to the conditions for the protection of employees indicated in the report aforesaid, the continued joint use by the Atlantic Coast Line Railroad Company, Scott M. Loftin and John W. Martin, trustees of the Florida East Coast Railway Company, Seaboard Air Line Railroad Company,

> Southern Railway Company, and Georgia Southern and Florida Railway Company of the passenger and freight terminal facilities of the Jacksonville Terminal Company until December 1, 1977, described in the report aforesaid, upon the terms and conditions in said report found just and reasonable, be, and it is hereby, approved and authorized."

Those terms and conditions are (R 73):

> "• • • The operating carriers state that no employees will be adversely affected but that they have no objection to the imposition of conditions similar to those prescribed in *Chicago & N.W. Ry. Co. Merger*, 261 I.C.C. 672. Our authorization and approval will be upon the understanding that the protective conditions contained in the cited case will be included herein."

It will thus be seen that the Interstate Commerce Commission did not consider the provisions of the operating agreement dealing with the internal management of the Terminal Company. Furthermore, it is apparent that the action complained of by the Respondent in its Complaint does not undertake to do more than maintain the status quo until a successor to the office of president and general counsel of the Terminal Company can be elected by the Board of Directors. The conclusion of the pleader that the petitioners entered into a transaction to acquire, maintain or exercise control, or the power to control, the operations of the Terminal Company is not supported by the facts pleaded in support of that conclusion.

The Court of Appeals for the Seventh Circuit, in the case of *Chicago & N.W. Ry. Co.* v. *Toledo, P. & W. R. Co.*, 324 Fed. 2d 936, decided December 5, 1963, had before it the identical

question, i. e., whether the federal district court had jurisdiction in a suit relating to a joint trackage agreement between two railroads which agreement had been approved by the Interstate Commerce Commission. The district court held that it did not have jurisdiction and the Court of Appeals affirmed, saying at page 938:

> "We hold that although it was necessary to obtain Interstate Commerce Commission approval of the 1957 agreement, this is not sufficient to confer jurisdiction upon the District Court. No mandatory order of the Interstate Commerce Commission is involved. We agree with the District Court that the Interstate Commerce Commission approval was permissive only. The fact that such permission was required, does not have the effect of making the commerce act a part of the contract insofar as the respective rights of North Western and TP&W are concerned."

This decision, involving the identical jurisdictional question, is in direct conflict with the decision of the Fifth Circuit Court of Appeals in the case at bar.

The Court of Appeals for the Sixth Circuit in *Teague v. Brotherhood of Locomotive Firemen*, et al, 127 Fed. 2d 53, in a case involving the construction of a collective bargaining agreement, which the plaintiff alleged impaired his seniority rights, held that no federal jurisdiction existed and said, at page 55:

> "• • • The mere fact that one of the alleged conspirators comes into existence through the operation of a Federal law does not bring into question either the validity or the interpretation of the statute. • • • • • Even were this a suit to enforce a right which takes its

> origin in the laws of the United States, a Federal question would not necessarily be involved for, as was said earlier, "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law, upon the determination of which the result depends." Shulthis v. McDougal, 225 U. S. 561, 569, 32 S. Ct. 704, 706, 56 L. Ed. 1205."

This decision also is in apparent conflict with the decision of the Fifth Circuit in the case at bar.

The Court of Appeals for the Eighth Circuit, in the case of *State Automobile Insurance Association* v. *Parry*, 123 Fed. 2d 243, involving the construction of a policy of insurance issued with a rider required by the Interstate Commerce Commission under the Motor Carrier Act, affirmed the action of the district court dismissing the case for want of jurisdiction on the ground that no substantial federal question was involved. The Court of Appeals said that a case which in fact depends for its decision upon a question of local law cannot be brought within the jurisdiction of the federal court merely by referring in the complaint to some federal statute and setting up a claim thereunder which obviously is without any reasonable foundation. Here again it appears that the decision is in conflict with that of the Circuit Court in this proceeding.

In *Marshall* v. *Desert Properties*, 103 Fed. 2d 551, certiorari denied, 308 U. S. 3, 84 L. Ed. 473, the Court of Appeals for the Ninth Circuit had before it an action to quiet title to

mining claims. The plaintiff alleged that the defendant's mining claims were invalid under the United States Mining Law, Title 30, United States Code, Section 21, et seq., because that Act limits a single locator of a placer mining claim to twenty acres for each claim so made. It was urged by the plaintiffs that a determination of their rights required a construction of the mining laws of the United States under which the defendant's purported locations were made. The district court held there was no jurisdiction and the Court of Appeals affirmed, citing *Gully* v. *First National Bank*, supra, and *Cook County* vs. *Calumet, etc. Canal Co.*, 138 U. S. 635, 34 L. Ed. 1110, where this Court said (138 U. S. 653):

> "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

In its opinion in the case at bar, the Circuit Court relied upon the recent decision of this Court in *International Association of Machinists* vs. *Central Airlines, Inc.*, 372 U. S. 682, 10 L. Ed. 2d 67. However, in that case the effect to be given to an award made by a System Adjustment Board established by agreement between the Union and the Airline depended of necessity upon the construction of the Railway Labor Act, as amended, (Section 151, et. seq., Title 45, United States Code) and the decision depended upon a construction of that statute. That case, therefore, differs in an essential element from the case at bar, for here neither of the parties has questioned the effect of Title 49, United States Code, Section 5(2), under which the Interstate Commerce Commission approved the execution of the December 1, 1947 agreement. No construction of that statute is required to determine the rights of the respondent under that agreement.

CONCLUSION

We respectfully submit that the Court of Appeals fell into error and because of the important jurisdictional question involved and the apparent conflict of the decision here with the cited decisions of this Court and of other Courts of Appeal, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

ORDER

(Number and Title Omitted)

Filed: Sept. 5, 1963

After due notice, this case was heard in open court on September 4, 1963, and the Court was fully advised in the premises. Upon consideration, it is

ORDERED that Defendants' Motion to Dismiss for lack of jurisdiction filed June 7, 1963 and June 10, 1963, are granted, and therefore Defendants' Motions to Strike are rendered moot.

DONE AND ORDERED at Jacksonville, Florida, this 5th day of September, 1963.

(Signed) WM. A. McRAE JR.
Judge.

AMENDED ORDER

(Number and Title Omitted)

Filed: Sept. 23, 1963

The plaintiff having made known to the Court its desire to appeal from the Court's ruling made by its Order dated September 5, 1963, granting defendants' motions to dismiss for lack of jurisdiction, without first attempting to amend the jurisdictional allegations of its complaint, and it appearing to the Court that doubt may reasonably exist as to whether the Court's Order as entered is an appealable Order, it is now ordered by the Court that the ordering portion of the Court's Order of September 5, 1963, be and the same is hereby amended to read as follows:

> "ORDERED that defendants' motions to dismiss for lack of jurisdiction filed June 7, 1963, and June 10, 1963, are granted, and therefore defendants' motions to strike are rendered moot. The above-entitled action be and the same is hereby dismissed for lack of jurisdiction."

DONE and ORDERED at Jacksonville, Florida, this 23rd day of September, 1963.

(Signed) WM. A. McRAE Jr.
Judge.

OPINION OF THE UNITED STATES CIRCUIT COURT, FIFTH CIRCUIT

Dated March 4, 1964

(Caption Omitted)

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

TUTTLE, Chief Judge: This litigation between two sets of railroad companies, over the management of the jointly owned Jacksonville Terminal Company, was dismissed by the trial court for want of federal court jurisdiction.

The present posture of the case can best be understood by our adopting the statement of the case as contained in appellant's brief, which is accepted as correct by each of the three appellees—a circumstance which we think it appropriate to say speaks well for the fairness and objectivity of counsel for appellant and equally well for the spirit of fairness and willingness to cooperate of counsel for the appellees. The result is that the court's task is made measurably simpler by being permitted to turn at once to the legal question. That question is: Did the trial court have jurisdiction of the subject matter of plaintiff's suit?

The following statement of the case has been agreed upon:

Alleging in its complaint that its action arises under the Interstate Commerce Act and thus within the jurisdiction of a federal court, Florida East Coast Railway Company prayed for injunctive relief and a money decree against

Jacksonville Terminal Company, owner and operator of Jacksonville's railroad terminal facilities, and against Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company, who with Southern Railway Company, Georgia Southern and Florida Railway Company and plaintiff jointly own Jacksonville Terminal Company and jointly control its affairs under an Operating and Guaranty Agreement between the parties dated December 1, 1947.

The Operating and Guaranty Agreement is alleged and is shown to provide in part:

> ". . . that the President or General Manager [of Terminal Company], or any other officer subject to election by the Board of Directors of the Terminal Company shall be appointed and serve only by unanimous consent of the Guarantor Companies and shall (any provision of the by-laws of the Terminal Company to the contrary notwithstanding) be dismissed upon the written request of any one of the Railway Companies, and . . . the dismissal of any subordinate official of the Terminal Company shall be made by the President or the General Manager upon the written request of any one of the Railway Companies."

Plaintiff charges by its complaint that on February 8, 1963, plaintiff made an appropriate written request, pursuant to Article Twenty-first of the Agreement, for the immediate dismissal of M. C. Jennette as President and General Manager and of Elliott Adams as General Counsel of defendant Terminal Company and that, by reason of the Agreement, by reason of the Interstate Commerce Commission's order authorizing and approving the Agreement and the transaction reflected thereby, and by reason of Title 49 United States

Code, Section 5, it became and was the duty of each defendant (a) to honor and enforce plaintiff's request and (b) not to enter into any transaction to acquire or maintain the power to control, directly or indirectly, Terminal Company's organization or operation and not to participate in accomplishing control of Terminal Company's organization in a common interest with any other defendant in any manner whatsoever, except in accordance with the Operating and Guaranty Agreement or otherwise with the prior approval and authorization of the Interstate Commerce Commission.

Plaintiff's claim for relief is that the defendants Terminal Company, Coast Line and Seaboard have refused to honor plaintiff's said request and have frustrated plaintiff's right effectively to object to the continued service of the two Terminal Company officials. Plaintiff alleges in terms that Terminal Company, Coast Line and Seaboard have thereby ousted plaintiff from its right to maintain jointly with the other owners the power to control the Terminal Company's organization and operation and that those defendants have acquired that power for themselves, in violation of (a) the Operating and Guaranty Agreement, which was created under the aegis of federal law to govern the affairs of Terminal Company in a way consistent with the law; and (b) the Interstate Commerce Act, which makes unlawful [Title 49 U.S.C., Section 5(4)] the acquisition of such power without the approval and authorization of the Interstate Commerce Commission.

On motions by the defendants Terminal Company, Coast Line and Seaboard, the district court dismissed the complaint and plaintiff's action for lack of jurisdiction.

The parties are not in substantial disagreement over the test of federal jurisdiction where it is asserted under the

Federal Question Section—28 U.S.C.A. § 1331—or under the Commerce and Anti-Trust Section—28 U.S.C.A. § 1337—of the jurisdiction statutes. As we stated in *Dickson v. Edwards*, 5 Cir., 293 F.2d 211 (a federal question suit):

> "The test is the familiar one that it must appear from the complaint that the construction of a federal statute will have an adverse effect on the right of recovery if the statute is construed one rather than another way."

Here, the plaintiff alleged that it had entered a contract with certain other carriers touching on the control and management of the Terminal Company, also, within the purview of the federal statutes, a carrier. This contract would have been illegal but for the order of the Interstate Commerce Commission approving it. This follows from the provisions of Title 49 U.S.C.A. § 5(4) quoted above which make it illegal for any carrier to participate in accomplishing or effectuating the control or management in a common interest of any two or more carriers, however attained except as provided under Title 49 U.S.C.A. § 5(2) which permits this to be done "with the approval and authorization of the Commission."

Thus, the appellant says that the need for this Commission-approved contract to be construed brings it within the purview of § 1337 as a proceeding "arising under an . . . Act of Congress regulating commerce." Appellant cites for this proposition the recent decision of the Supreme Court in International Association of Machinists, *AFL-CIO v. Central Airlines, Inc.*, 372 U.S. 682 which, in a somewhat different context, but still speaking of a contract authorized by a federal statute, said: "It is federal law which would determine whether a § 204 contract is valid and enforceable ac-

cording to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many states, for it would be fatal to the goals of the Act if a contractual provision contrary to the federal command were nevertheless enforced under state law or if a contract were struck down though in furtherance of the federal scheme."

We think this reasoning is apposite here. A specific contract of joint ownership of the Terminal was approved by the Interstate Commerce Commission. It contained express provisions dealing with management personnel. The complaint specifically alleges a breach of this contract by appellees touching upon management personnel. The defendants (although this is not to be considered in passing upon jurisdiction) say, in effect, that they cannot perform the contract literally as written because of peculiarities of Florida state law.

We think the contract which was authorized by federal statute and made legal only because of the federal statute may be construed by the federal court upon application of the plaintiff.

Moreover, there is more than a merely colorable contention by appellant that the conduct of the appellees violates the terms of the statute itself, in that the "freezing" of management contrary to the Interstate Commerce Commission-approved plan, amounts to entering into a transaction to accomplish or effectuate the control or management of the Terminal Company in a manner different from that authorized by Title 49 U.S.C.A. § 5(2). This being the issue raised by the complaint, the plaintiff is entitled to have the question determined by a federal court. Even though the trial court may decide contrary to appellant's contention as to the

theory of recovery, the complaint presents the issue and makes the contention. It thus asserts federal jurisdiction.

The judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

JUDGMENT ENTERED BY COURT OF APPEALS

March 4, 1964

(Caption Omitted)

Before TUTTLE, Chief Judge, and JONES and BELL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Jacksonville Terminal Company, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 4, 1964

ORDER DENYING PETITION FOR REHEARING

Dated March 31, 1964

(Caption Omitted)

Before TUTTLE, Chief Judge, JONES and BELL, Circuit Judges. PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

APPENDIX B

TITLE 28, SECTION 1337, UNITED STATES CODE

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 640, 62 Stat. 931."

TITLE 49, SECTION 5 (2), UNITED STATES CODE

Unifications, mergers, and acquisitions of control. (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission; and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in

section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this chapter, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6) of this section, is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

(d) The Commission shall have authority in the case of a proposed transaction under this paragraph involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

(f) As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective

date of such order. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees. Feb. 4, 1887, c. 104, Pt. I, § 5, 24 Stat. 380; Feb. 28, 1920, c. 91, § 407, 41 Stat. 580; June 16, 1933, c. 91, Title II, §§ 201, 202, 48 Stat. 217; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § 7, 54 Stat. 905; Aug. 2, 1949, c. 379, § 3, 63 Stat. 485.

ARTICLE TWENTY-FIRST — OPERATING AND GUARANTY AGREEMENT OF DECEMBER 1, 1947

AND IT IS MUTUALLY COVENANTED AND AGREED:

TWENTY-FIRST: That the use of said station, tracks and facilities of the Terminal Company by the Railway Companies shall be subject to the jurisdiction of the Terminal Company and its duly authorized officers and employees; and the Railway Companies agree that while in or about the said terminal facilities of the Terminal Company, their employees and trains shall faithfully conform to all reasonable and proper instructions and directions of all proper officers of, and will use the proper standard time prescribed by, the Terminal Company, PROVIDED, however, that the President or General Manager, or any other officer subject to election by the Board of Directors of the Terminal Company, shall be appointed and serve only by unanimous consent of the Guarantor Companies and shall (any provision of the by-laws of the Terminal Company to the contrary notwithstanding) be dismissed upon the written request of any one of the Railway Companies, and that the dismissal of any subordinate official of the Terminal Company shall be made by the President or the General Manager upon the written request of any one of the Railway Companies. The Terminal Company shall require that the services of all its officers and employees shall be performed without partiality or discrimination as between the Railway Companies.

Office-Supreme Court, U.S.
FILED
JUL 21 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No 206.

JACKSONVILLE TERMINAL COMPANY, a corporation, ATLANTIC COAST LINE RAILROAD COMPANY, a corporation, and SEABOARD AIR LINE RAILROAD COMPANY, a corporation,

Petitioners,

vs.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION.

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Petitioners,

vs.

FLORIDA EAST COAST RAILWAY COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION.

Question Presented:

Whether the United States district court has jurisdiction of the subject matter of respondent's complaint.

Statutes Involved.

The relevant provisions of section 5(2)(a) of the Interstate Commerce Act are:

> "It shall be lawful, with the approval and authorization of the Commission . . .
>
> "(i) . . . for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate

the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise . . . or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

Title 49 U. S. C. 5(2)(a).

Although it is not mentioned in the petition for writ of certiorari, section 5(4) of the Interstate Commerce Act is directly involved in this litigation. It provides, in pertinent part:

"It shall be unlawful for any person, except as provided in paragraph (2) of this section, to enter into any transaction within the scope of subdivision (a) of paragraph (2) of this section, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. . . . As used in this paragraph and paragraph (5) of this section, the words 'control or management' shall be construed to include the power to exercise control or management."

Title 49 U. S. C. 5(4).

Statement.*

Alleging in its complaint (R. 2) that its action arises under the Interstate Commerce Act and thus within the jurisdiction of a federal court, plaintiff and respondent Florida East Coast Railway Company prayed for injunctive relief and a money decree against Jacksonville Terminal Company, owner and operator of Jacksonville's railroad terminal facilities, and against Atlantic Coast Line Railroad Company and Seaboard Air Line Railroad Company, who with Southern Railway Company, Georgia Southern and Florida Railway Company and F. E. C. jointly own Jacksonville Terminal Company and jointly control its affairs under an Operating and Guaranty Agreement between the parties dated December 1, 1947.

Article Twenty-first of the Operating and Guaranty Agreement is alleged (R. 5) and is shown (R. 41) to provide in part:

> "... that the President or General Manager [of Terminal Company], or any other officer subject to election by the Board of Directors of the Terminal Company shall be appointed and serve only by unanimous consent of the Guarantor Companies and shall (any provision of the by-laws of the Terminal Company to the contrary notwithstanding) be dismissed upon the written request of any one of the Railway Companies, and ... the dismissal of any subordinate official of the Terminal Company shall be made by the President or the General Manager upon the written request of any one of the Railway Companies."

* This statement of the case is substantially that which was adopted by the court of appeals in its opinion (R. 88-90; A. 17-19).

F. E. C. charges by its complaint that on February 8, 1963, F. E. C. made an appropriate written request, pursuant to Article Twenty-first of the Agreement, for the immediate dismissal of M. C. Jennette as President and General Manager and of Elliott Adams as General Counsel of Terminal Company and that, by reason of the Agreement, by reason of the Interstate Commerce Commission's order authorizing and approving the Agreement and the transaction reflected thereby, and by reason of Title 49 United States Code, Section 5, it became and was the duty of each defendant (a) to honor and enforce F. E. C.'s request and (b) not to enter into any transaction to acquire or maintain the power to control, directly or indirectly, Terminal Company's organization or operation and not to participate in accomplishing control of Terminal Company's organization in a common interest with any other defendant in any manner whatsoever, except in accordance with the Operating and Guaranty Agreement or otherwise with the prior approval and authorization of the Interstate Commerce Commission.

F. E. C.'s claim for relief is that Terminal Company, Coast Line and Seaboard have refused to honor F. E. C.'s said request and have frustrated F. E. C.'s right effectively to object to the continued service of the two Terminal Company officials.* F. E. C. alleges in terms that Terminal Company, Coast Line and Seaboard have thereby ousted F. E. C. from its right to maintain jointly with the other

* The complaint (R. 7) asserts not only that Coast Line and Seaboard "insisted that they would take no action to honor and enforce" F. E. C.'s request, as pointed out by petitioners (petition, p. 5), but also that Coast Line and Seaboard induced the Terminal Company directors serving by their designation to defeat a motion to vacate the questioned offices, thereby perpetuating Jennette and Adams in their respective offices against the wishes of F. E. C. and of defendant Southern (R. 7).

owners the power to control the Terminal Company's organization and operation and that those defendants have acquired that power for themselves, in violation of (a) the Operating and Guaranty Agreement, which was created under the aegis of federal law to govern the affairs of Terminal Company in a way consistent with the law; and (b) the Interstate Commerce Act, which makes unlawful [Title 49 U. S. C., Section 5(4)] the acquisition of such power without the approval and authorization of the Interstate Commerce Commission.

On motions by Coast Line, Seaboard and Terminal Company, the district court dismissed the complaint and F. E. C.'s action for lack of jurisdiction. On F. E. C.'s appeal, the court of appeals held that the district court had power to determine the controversy, reversed the case and remanded it for further proceedings. By their petition for writ of certiorari, Coast Line, Seaboard and Terminal Company assert that the decision of the court of appeals conflicts with applicable decisions of this Court and of other courts of appeals.*

Argument.

The court of appeals properly held that federal jurisdiction of this litigation is founded on two independent grounds: (a) the Operating and Guaranty Agreement and F. E. C.'s alleged right under Article Twenty-first jointly to exercise power to control Terminal Company's organization and operation are creations of the Interstate Commerce Act and must be interpreted and enforced consistently

* Although Southern Railway Company and Georgia Southern and Florida Railway Company are parties defendant and supported F. E. C.'s position before the court of appeals as parties appellee, petitioners have not named Southern and Georgia Southern as respondents to the petition for certiorari.

with the policy of the Act; and (b) F. E. C. makes a substantial allegation that Coast Line and Seaboard have undertaken to acquire or maintain the power to control Terminal Company in a way not authorized by the Interstate Commerce Commission pursuant to Section 5(2) of the Act, in violation of Section 5(4).

Petitioners assert the existence of an abstract conflict between decisions which, even if it existed, could not be resolved in such a way as to affect the district court's duty on independent jurisdictional grounds to determine the controversy. Moreover, the interlocutory decision below is correct. It is in harmony with this Court's decision in *International Association of Machinists, AFL-CIO* v. *Central Airlines, Inc.*, 372 U. S. 682, and it does not conflict with any decision of this or any other court. The case is therefore not one in which it is appropriate to grant the writ.

I.

It is inappropriate to review the matter presented because the decision below is not final and because review would not affect the district court's power and duty to determine the controversy.

The decision sought to be reviewed is an interlocutory and not a final decision, a fact that "of itself alone" furnishes "sufficient ground for the denial" of the writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258.

This case is not, as petitioners claim (petition, p. 7), one of those exceptional litigations in which review of an interlocutory decision "is necessary to prevent extraordinary inconvenience and embarrassment in the conduct

of the cause." *American Construction Co.* v. *Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 372, 384. While the question of federal jurisdiction ordinarily may properly be characterized as "fundamental to the further conduct of the case" [*United States* v. *General Motors Corp.*, 323 U. S. 373, 377; *Land* v. *Dollar*, 330 U. S. 731, 734], review of the question posed by petitioners could not affect the district court's jurisdiction of this controversy.

Petitioners have concentrated their attack on that aspect of the decision below in which the court, applying the principle of *International Association of Machinists, AFL-CIO* v. *Central Airlines, Inc.*, 372 U. S. 682, held that the asserted contractual rights depend for their existence on the effect of the Interstate Commerce Act and that, under the circumstances,

> "the contract which was authorized by federal statute and made legal only because of the federal statute may be construed by the federal court upon application of the plaintiff." R. 92; A. 21.

Petitioners have omitted from their petition all but the most casual reference (p. 10) to the plain allegations of the complaint that petitioners

> "entered into a transaction to acquire, maintain or exercise control or the power to control, directly or indirectly, the organization or operation of defendant Terminal Company, and participated in accomplishing or effectuating the control or management of the organization or operation of defendant Terminal Company in a common interest with defendants Coast Line and Seaboard, *in violation of Title 49 United States Code, Section 5(4)*. . . ." R. 7 (emphasis added).

The court of appeals held in this case that the quoted allegation constitutes "more than a merely colorable contention by appellant that the conduct of the appellees violates

the terms of the statute itself" (R. 92; A. 21) and independently justifies and requires the district court to exercise jurisdiction. Although petitioners remark in passing (petition, p. 10) that they do not think a violation is shown by the facts pleaded in the complaint (a matter not yet decided by the district court), the petition contains no assertion that the court below, in sustaining federal jurisdiction to resolve that controversy, rendered a decision in conflict with any decision of this or any other court. Neither does the petition assert that the court below erred in this holding. Thus, resolution of the conflict which is said to exist would not affect the district court's jurisdiction to determine whether petitioners have violated section 5(4) of the Commerce Act by "entering into a transaction to accomplish or effectuate the control or management of the Terminal Company in a manner different from that authorized by Title 29 U. S. C. A. §5(2)" [Opinion, R. 93; A. 21].

In the circumstances of this case, petitioners' claim that the decision below conflicts with other applicable decisions can be regarded as raising only an academic question that is not a proper subject of review by this Court. See *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U. S. 180, 184.

II.

The decision below is not in conflict with the decisions of this Court and of other courts of appeal.

In determining that the district court has jurisdiction to construe and enforce Article Twenty-first of the Operating and Guaranty Agreement,

> "which was created under the aegis of federal law to govern the affairs of Terminal Company in a way consistent with the law."
>
> Opinion, R. 90; A. 19.

the court of appeals did not render a decision in conflict with this Court's decisions in *Gully v. First National Bank*, 299 U. S. 109, and the related cases cited in the petition (p. 7). Neither does the decision conflict with the cited cases of other courts of appeal (petition, pp. 10-13).

The principle of *Gully* was most recently applied by this Court in *International Association of Machinists, AFL-CIO v. Central Airlines, Inc.*, 372 U. S. 682, upon which the court below properly relied in its decision (Opinion, R. 91, 32a-33a, 20-21). In that case it was shown that the Railway Labor Act, as amended to apply to airlines, dictated that the airlines' contract with their employees' union provide for establishment of a system board of adjustment for the purpose of adjusting and deciding disputes. The contract was made to so provide. Such a dispute was decided in favor of certain employees by the system board of adjustment and a neutral referee, and the employees brought suit in the district court to enforce the award. The district court, being of the view that the action arose out of the contract but not out of the Railway Labor Act, dismissed the action for lack of federal jurisdiction. The Court of Appeals for the Fifth Circuit affirmed, in *International Association of Machinists, AFL-CIO v. Central Airlines, Inc.* (5th Cir. 1961), 295 F. 2d 209, with Judge Brown dissenting. This Court, reversing, declared that

> "It is federal law which would determine whether a § 204 contract is valid and enforceable according to its terms. If these contracts are to serve this function under § 204, their validity, interpretation, and enforceability cannot be left to the laws of the many States. . . ."

372 U. S. at 691.

that the contracts and the adjustment boards thereby created

> "are creations of federal law and bound to the statute and its policy."

372 U. S. at 692;

and that the provisions of the contract in question

> "are to be judged against the Act and its purposes and enforced or invalidated in a fashion consistent with the statutory scheme."

372 U. S. at 694.

This Court concluded:

> "Whether Central must comply with the award or whether, instead, it is impeachable, are questions controlled by federal law and are to be answered with due regard for the statutory scheme and purpose. To the extent that the contract imposes a duty consistent with the Act to comply with the awards, that duty is a federal requirement. If Central must comply, it is because federal law requires its compliance. . . . In our view the complaint in this case, for jurisdictional purposes, presented a substantial claim having its source in and arising under the Railway Labor Act and the District Court therefore has jurisdiction under 28 U. S. C. 1331 if the jurisdictional amount is satisfied and in any case under 1337. . . ."

372 U. S. at 695.

In this case, as surely as in the cited case, the contract sought to be enforced is "a creation of federal law and bound to the statute and its policy." Without the validating endorsement of the Interstate Commerce Commission, the Agreement would be a nullity and constitute a criminal transaction. Title 49 U. S. C. 5a. Whether Article

Twenty-first should be enforced according to its terms must be judged with due regard to the spirit of the Commission's order and consistently with the statutory scheme and purpose of the Interstate Commerce Act.

In the *Central Airlines* case, this Court stated that "the needs of the subject matter manifestly call for uniformity" (372 U. S. at 692). To make the enforcement of such contracts dependent on the divergent views of the legislatures and courts of 50 States would, the Court held, "aggravate the problem to an intolerable degree" (*ibid.* note 16). The Court agreed with the views expressed in the court of appeals by Judge Brown, that effective federal control should not be "precariously dependent upon the accident of diversity of citizenship" (*ibid.* note 15).

Petitioners contended before the court of appeals, in effect, "that they cannot perform the contract literally as written because of peculiarities of Florida state law" (Opinion, R. 92: A. 21). The same contention, that the case "depends for its decision upon a question of local law," is made inferentially in the petition (p. 12). While the court below held that petitioners' actual contention to this effect may not properly be considered in determining jurisdiction (opinion below, R. 92: A. 21), the mere possibility that the obligations of this federally-sponsored contract may be impaired by the "peculiarities of Florida state law" demonstrates that this controversy should be decided by a federal court, lest the prophecy of Mr. Justice White, writing for the unanimous Court in *Central Airlines*, be fulfilled:

> "If these contracts are to serve this function . . . their validity, interpretation, and enforceability cannot be left to the laws of the many States, for it would be fatal to the goals of the Act . . . if a contract were

struck down even though in furtherance of the federal scheme."

372 U. S. at 691.

The "apparent conflict" (petition, p. 7) that is said to exist between the decision below and the cited decisions of other courts of appeal (petition, pp. 10-13) is apparent only, and not real. The decision of the Court of Appeals for the Seventh Circuit in *Chicago & North Western Ry. Co. v. Toledo, Peoria & Western R. R. Co.* (7th Cir. 1963), 324 F. 2d 936, bears the closest resemblance to this controversy. In that case, although plaintiff's alleged contractual right arose from a "joint trackage agreement [which] could not have been undertaken without the approval of the Interstate Commerce Commission," the court refused to sustain federal jurisdiction. 324 F. 2d at 938. It is noteworthy that the court in that case (decided December 5, 1963, affirming the district court's decision rendered February 28, 1963), did not so much as mention this Court's decision in *Central Airlines* (decided April 15, 1963) in its opinion. But the significant difference between that case and this one—eliminating any possible conflict between the decisions—is that the plaintiff in the seventh circuit case did not and apparently was unable to make even a colorable allegation that the defendant violated the Interstate Commerce Act itself. See the district court's opinion, 217 F. Supp. 64, 68-69.

The Interstate Commerce Act is not only the source of the rights asserted by F. E. C., it is inextricably a part of the Operating and Guaranty Agreement and of this litigation. The question in controversy is whether Coast Line and Seaboard may properly effectuate a measure of control over Terminal Company's organization and operation by preventing the discharge of its president and general counsel. Such conduct, we contend, is foreclosed by Article

Twenty first of the Agreement. It is also foreclosed by section 5(4) of the Act, by which Congress proscribed what the Commission has not expressly authorized. Thus, construction of the Commerce Act is unavoidable. The court that eventually construes Article Twenty-first of the Agreement to determine the rights asserted by the complaint will necessarily and simultaneously decide what has been permitted under section 5(2) of the Act and what is still forbidden by section 5(4).

Thus, for perhaps stronger reasons than those applicable in *Central Airlines*, it is essential that this case be decided by a federal court as one arising under an "Act of Congress regulating commerce" [Tit. 28 U. S. C., Sec. 1337]. In this case, more clearly than in *Central Airlines*,

> "To the extent that the contract imposes a duty consistent with the Act to comply . . . , that duty is a federal requirement. If [Coast Line or Seaboard or Terminal Company] must comply, it is because federal law requires its compliance."
>
> 372 U. S. at 695.

Conclusion.

The writ of certiorari should be denied.

Respectfully submitted,

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